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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

HENRY WASHINGTON ERWIN, III,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE TENTH SUPREME JUDICIAL DISTRICT, WACO, TEXAS

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QUESTIONS PRESENTED

I. Whether evidence that the Petitioner "[flew] in an uncertified plane, [used] an alias to rent an apartment where the conspirators met, [lied] about his association with [a co-conspirator], and [lied] about his passport" was legally sufficient to convict Petitioner of the offense of conspiring to possess a controlled substance through "fraud, misrepresentation, or deception" (*Indictment,* RI 6; *Texas Penal Code,* Art. 71.02(a)(5).

II. Whether the interpretation given to whether *Texas Penal Code,* Art. 71.02(a)(5) by the Texas Court of Appeals so as to permit conviction of the offense of possession of a controlled substance by fraud, misrepresentation, or deception on evidence showing only that the accused "[flew] in an uncertified plane, [used] an alias to rent an apartment where the conspirators met, [lied] about his association with [a co-conspirator], and [lied] about his passport," is so vague and indefinite as to fall afoul of the United States Constitution.

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OCTOBER TERM, 1982

HENRY WASHINGTON ERWIN, III,

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE TENTH SUPREME JUDICIAL DISTRICT, WACO, TEXAS

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Petitioner, HENRY WASHINGTON ERWIN, III, Appellant in the court below, respectfully prays that a writ of certiorari issue to review the judgment of the Texas Court of Appeals for the Tenth Supreme Judicial District, Waco, Texas, entered in the above case on June 3, 1982.

That decision affirmed the conviction and judgment of Petitioner entered by the 54th District Court for McLennan County, Waco, Texas.

OPINIONS BELOW

The opinion of the Texas Court of Appeals for the Tenth Supreme Judicial District, Waco, Texas from which Henry Washington Erwin, III now petitions for a writ of certiorari, *Erwin v. State*, No. 10-81-001-CR (Tex. Ct. App. June 3, 1982), was issued as a non-published memorandum opinion and is reproduced herein as Appendix "A," *infra*. The denial of the Petitioner's *Petition for Discretionary Review* to the Texas Court of Criminal Appeals (*Erwin v. State*, No. 565-82 September 22, 1982), is not published and is reproduced herein as Appendix "B." The denial of the Petitioner's *Motion for Rehearing* of his Petition for Discretionary Review (*Erwin v. State*, No. 565-82 October 20, 1982), is not published and is reproduced herein as Appendix "C."

JURISDICTION

The Judgment of the Texas Court of Appeals affirming the conviction of Petitioner was entered on June 3, 1982. The Texas Court of Criminal Appeals denied Petitioner's Petition for Discretionary Review on September 22, 1982. A timely Motion for Rehearing was filed by Petitioner and denied by the Texas Court of Criminal Appeals on October 20, 1982. This Petition is timely filed within sixty (60) days of the denial of rehearing under the *Supreme Court Rules*, Rule 22. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTORY PROVISIONS INVOLVED

1. *U.S. Constitution,* Amendment IV provides in pertinent part that:

> No person shall . . . be deprived of life, liberty, or property, without due process of law.

2. *U.S. Constitution,* Amendment XIV provides in pertinent part that:

> No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; . . . .

3. *Texas Penal Code,* Art. 71.02(a)(5) provides:

> (a) A person commits an offense, if with the intent to establish, maintain, or participate in a combination or in the profits of a combination, he commits or conspires to commit one or more of the following:
>
> . . . .
>
> (5) . . . unlawful possession of a controlled substance or dangerous drug through forgery, fraud, misrepresentation or deception;

STATEMENT OF THE CASE

This is a Petition for a Writ of Certioari from an opinion of the Texas Court of Appeals (App. "A") affirming the previous judgment and conviction of Petitioner of the offense of organized criminal activity, *Texas Penal Code,* Art. 71.02(a)(5) entered against Petitioner in the 54th District Court of McLennan County, Texas.

The Petitioner was indicted in April 21, 1981 as follows:

> [T]hat HENRY WASHINGTON ERWIN, III * * * on or about the 27th day of May A.D. 1980, * * * with intent to establish, maintain and participate in a combination and the profits of a combination which consisted of at least five of the following people * * * did then and there knowingly conspire with one or more persons in said combination to engage in conduct which would constitute the offense of the illegal possession of a controlled substance, namely a useable quantity of marijuana, over the amount of four (4) ounces, by fraud, misrepresentation and deception.

The indictment relied on Texas Penal Statute Art. 71.02(a)(5) which provided: "(a) A person commits an offense, if with the intent to establish, maintain, or participate in a combination or in the profits of a combination, he commits or conspires to commit one or more of the following: . . . (5) . . . unlawful possession of a controlled substance or dangerous drug through forgery, fraud, misrepresentation or deception."

At trial, the evidence generally demonstrated that a criminal combination or conspiracy which included the Petitioner as a member existed and that such combination or conspiracy was formed for the purpose of importing marijuana into the United States (RII 65). Specifically, the scheme involved the Petitioner and another co-conspirator flying a large amount of marijuana from Colombia to a small airport near Waco, Texas (RII 106-107). According to Government witnesses, the plan was abandoned when the aircraft utilized by the conspiracy crashed and burned in Colombia (RII 106-107). Prior to the crash, the state showed several meetings of conspirators (RII 46-59), some of which occurred in a room that the Appellant rented under an

alias (RIV 453). The state also showed that the plane, a "Convair 440," was not safety certified. Following the plane crash in Colombia, the evidence showed that the Petitioner reentered the United States at Miami, Florida after arriving from Colombia (RIV 539-543, 546-549). At that time, the Petitioner claimed that his passport was lost or stolen which was untrue (RIV 545-549), and that he did not know a fellow conspirator which was also untrue (RV 549). Following this trial, the Petitioner was convicted under the above indictment (RI 6), and sentenced to five (5) years confinement and a $5,000.00 fine (RV 707).

Prior to his conviction, the Petitioner complained of lack of proof that he conspired "to engage in conduct which would constitute the offense of . . . possession of a controlled substance . . . *by fraud, misrepresentation and deception* . . ." (emphasis in original), *Defendant's Motion for Instructed Verdict* (RI 75). That Motion alleged that:

> The indictment therefore essentially alleges that the Defendant conspired to possess marijuana through fraud, misrepresentation and deception. The proof, if it shows anything at all, merely shows that the Defendant conspired to possess marijuana. There is no evidence which shows that the Defendant conspired to possess the controlled substance through any act of fraud, by misrepresentation, or through deception.

Motion, ibid.

After the overruling of his Motion and his subsequent conviction, the Petitioner appealed to the Texas Court of Appeals for the Tenth Supreme Judicial District, complaining:

VII.

THE TRIAL COURT ERRED IN HOLDING THAT THERE WAS SUFFICIENT EVIDENCE TO SUSTAIN A CONVICTION WHERE THE EVIDENCE OF THE STATE DID NOT PROVE THE ALLEGATION IN THE INDICTMENT THAT THE APPELLANT: * * * DID THEN AND THERE KNOWINGLY CONSPIRE WITH ONE OR MORE PERSONS IN SAID COMBINATION TO ENGAGE IN CONDUCT WHICH WOULD CONSTITUTE THE OFFENSE OF THE ILLEGAL POSSESSION OF A CONTROLLED SUBSTANCE, NAMELY A USEABLE QUANTITY OF MARIJUANA, OVER THE AMOUNT OF FOUR (4) OUNCES, *BY FRAUD, MISREPRESENTATION AND DECEPTION,* NAMELY MARIJUANA INTO THE UNITED STATES OF AMERICA BY AIRPLANE.

App. *Brief,* at 2, 38 (emphasis in original).

The Texas Court of Appeals overruled this ground of error, holding:

> In his seventh ground of error, Appellant challenges sufficiency of the evidence to prove Appellant acted by "fraud, misrepresentation and deception." The following are illustrative of Appellant's acts of fraud, misrepresentation and deception and were sufficient to sustain the conviction: flying in an uncertified plane, using an alias to rent the apartment where the conspirators met, lying about his association with Baldi and lying about his passport.

Erwin v. State, No. 10-81-001-CR, Slip Opinion June 3, 1982, at 8; App. "A."

Following the affirmance of his conviction by the Texas Court of Appeals on June 3, 1982 (*Erwin, supra*; App. "A"), the Petitioner unsuccessfully sought a hearing of his cause before the Texas Court of Criminal Appeals in a *Petition for Discretionary Review* and in a *Motion*

for Rehearing of Petition for Discretionary Review in which he argued that the evidence was legally insufficient to show that he conspired to possess a controlled substance through fraud, deception, etc., or, in the alternative, the statute as interpreted by the Court of Appeals was unconstitutionally vague and ambiguous. The *Petition* and *Motion for Rehearing* were both denied.

There are no factual issues in this case. The Petitioner concedes that he flew "in an uncertified plane"; used "an alias to rent the apartment where the conspirators met"; and "lied about his association with Baldi and about his passport," *Erwin*, at 8; App. "A." The Petitioner does not concede that this evidence shows a conspiracy to possess a controlled substance through fraud, etc., as these statutory terms have been interpreted by Texas Courts, other state Courts, and by Federal Courts and as such terms must be interpreted to escape the complaint that they are unconstitutionally vague and indefinite.

REASONS WHY THE WRIT SHOULD BE GRANTED

I.

EVIDENCE THAT THE PETITIONER "[FLEW] IN AN UNCERTIFIED PLANE, [USED] AN ALIAS TO RENT AN APARTMENT WHERE THE CONSPIRATORS MET, [LIED] ABOUT HIS ASSOCIATION WITH [A CO-CONSPIRATOR], AND [LIED] ABOUT HIS PASSPORT" WAS LEGALLY SUFFICIENT TO CONVICT PETITIONER OF THE OFFENSE OF CONSPIRING TO POSSESS A CONTROLLED SUBSTANCE THROUGH "FRAUD, MISREPRESENTATION, OR DECEPTION" (*INDICTMENT*, RI 6; *TEXAS PENAL CODE*, ART. 71.02(a)(5)).

A. The importance of this case arises from the fact that the statutory language which was given a radical and novel interpretation by the Texas Court of Appeals is common to virtually every state and federal jurisdiction.

1. *The Texas Statute and the Previous Case Law Interpreting It.*

The Petitioner's Indictment read: "Unlawful possession of a controlled substance . . . through . . . fraud, misrepresentation or deception." *Indictment*, RI 6. The Petitioner was convicted of violating *Texas Penal Code*, Art. 71.02(a)(5) which reads:

> (a) A person commits an offense if, with the intent to establish, maintain, or participate in a combination or in the profits of a combination, he commits or conspired to commit one or more of the following:
>
> . . . .

> (5) unlawful possession of a controlled substance . . . through forgery, fraud, misrepresentation, or deception;

The wording of this Texas statute is itself patterned after the Texas Controlled Substance Act, V.A.C.S. Art. 4476(a)(5).

> Sec. 4.09. (a) It is unlawful for any person knowingly or intentionally:
>
> . . . .
>
> (5) to acquire or obtain possession of a controlled substance by misrepresentation, fraud, forgery, deception, or subterfuge;

All reported appellate Texas cases which deal with this statutory language have been cases where the Defendant was charged with utilizing a false prescription, giving deceiving information, utilizing an alias, forging a prescription, etc., *to a physician, pharmacist, or the like.* In no case were the facts reported so as to give even an indication that the statute could be applied to conduct such as was present in this case, for example: giving a false name to an apartment manager, lying to a customs inspector about one's passport and associations, or flying in a plane that was not "safety" certified. *See Posey v. State,* 545 S.W.2d 162 (Tex. Cr. App. 1977); *Rejcek v. State,* 545 S.W.2d 164 (Tex. Cr. App. 1977); *Ex Parte Russell,* 561 S.W.2d 844 (Tex. Cr. App. 1978); *Clark v. State,* 577 S.W.2d 238 (Tex. Cr. App. 1979); *Ex Parte Holbrook,* 609 S.W.2d 541 (Tex. Cr. App. 1980). *See also* 4 Branch's *Tex. Annot. Penal Stats.* § 4.09 at pp. 268-272; 40 Tex. Jur. 2d Rev. Pt. 2 § 49.

2. *Statutory Language and Case Law in Other State Jurisdictions.*

As pointed out previously, the magnitude of the error of interpretation made by the Texas Court is magnified by the fact that the language is common to controlled substance law in all jurisdictions. The reason behind the identical language being present in many jurisdictions and near-identical language being present in virtually all jurisdictions is that this statutory language had the same genesis, history, purpose, etc. The earlier *Uniform Narcotic Drug Act* which was passed by most state jurisdictions read:

> (1) No person shall obtain or attempt to obtain a narcotic drug, or procure or attempt to procure the administration of a narcotic drug, (a) by fraud, deceit or misrepresentation, or subterfuge; or (b) by the forgery or alteration of a prescription or of any written order; or (c) by the concealment of a material fact; or (d) by the use of a false name or the giving of a false address.

Uniform Narcotic Drug Act, § 17.

See "Producing Narcotic–Fraud and Deceit," 25 A.L.R. 3d 1118 §§ 1 and 2. This provision was then modified slightly and then inserted into the Uniform Controlled Substances Act, 25 Am. Jur. 2d § 27.5 which is common to virtually every state jurisdiction. Section 403(a)(3) of the Uniform Controlled Substances Act makes it unlawful for "any person knowingly or intentionally . . . to acquire or obtain possession of a controlled substance by misrepresentation, fraud, forgery, deception or subterfuge." *Compare* V.A.C.S. Art. 4476-15, § 4.09(5); Texas Penal Code, Art. 71.02(a)(5). Throughout the entire history of the acts in question, this language has never been utilized to reach the conduct demonstrated

in this case. The various commentators have indicated what the interpretation and application have always been:

> Attempting to obtain a narcotic drug by fraud, or concealment of a material fact, or by the use of a false name or address, is prohibited by the statute, as is the uttering of a false or forged prescription, the affixing of a false or forged label to a package containing narcotics, and the making of a false statement in any prescription, order, report, or record required by the act.

25 Am. Jur. 2d 297 § 20.

The history of the actual use of this language has been uniform over the years in all reported appellate cases, for example: *State v. Logan*, 83 P.2d 1035 (Nevada), fraudulent prescription; *State v. Belanger*, 167 A.2d 245 (Conn. 1961), falsely complaining of pains to physician and concealing addiction; *People v. Nelson*, 225 N.E.2d 820 (Ill. 1967), obtaining multiple refills by deceit and concealment; *State v. Espinoza*, 66 So. 2d 323 (La. 1950), forged prescription; *Hill v. State*, 266 P.2d 979 (Okla. 1954); *Mosely v. State*, 299 So. 2d 317 (Alabama), fraudulent call from physician; *State v. Livingston*, 469 P.2d 632 (Or. 1965), untruthfulness or nondisclosure in obtaining drugs from pharmacy; *State v. Lee*, 382 P.2d 491 (Wash. 1963), false name given to physician and/or pharmacy; *State v. Powell*, 321 P.2d 333 (Or. 1958).

3. *Federal Statutes and Case Law.*

The only reported Federal appellate case dealing with similar language interpreted the Federal statutory language (21 U.S.C. § 843(a)(3)) as follows:

> 21 U.S.C. § 843(a)(3) makes it unlawful "to acquire or obtain possession . . . *by* misrepresen-

> tation, fraud, . . . , deception, or subterfuge." (Emphasis added.) See footnote 1, *supra.* The statute does not proscribe the mere making of a false statement or representation, or the making of a false statement or representation with an intent to influence another's action but without actual influence. The statute explicitly includes an element of causation.

United States v. Bass, 490 F.2d 846, 857, n.11 (5th Cir. 1974).

The *Bass* case like those cases in the state jurisdictions cited was a prosecution based on attempting to obtain a controlled substance by forged prescription from a pharmacist, *Bass,* 490 F.2d at 846-847.

B. Aside from legal precedent, the interpretation given the statutory language by the Texas Court of Appeals defies logic and common sense.

The fact that the Petitioner used an uncertified plane and used a fake name while renting an apartment which was used as a meeting place, *Opinion,* at 8, were not deception *by* or *through* which he obtained the marijuana. For example, to construe the statutory language this way would apply the identical language of V.A.C.S. 4476-15 § 4.09 to a person who used a false driver's license *to drive to a pharmacy* and did not use the false license for any purpose other than that. There was never any evidence that the conspirators gave a false name to the actual drug suppliers in Colombia; however, Counsel doubts that such conduct would fall under the statutory language anyway. Furthermore, the Petitioner's lies about alleged co-conspirator Baldi and about his passport, *Opinion,* at 8, occurred after the plane carrying the

marijuana had crashed (RIV 546-549). It was certainly not conduct *by* or *through* which the marijuana was obtained, if such conduct falls under the statutory language at all.

C. The merits of the cause indicate that the Defendant was convicted of a crime that he simply did not commit.

The State of Texas was not drawn into using that statutory language by lack of alternatives. The State of Texas *could have* indicted the Petitioner properly, and perhaps convicted him of an offense aside from a conspiracy to possess "a controlled substance . . . through forgery, fraud, etc." *Texas Penal Code*, Art. 71.02(a)(5) also would allow indictment and conviction of a person who is engaged in a conspiracy involving the "unlawful . . . delivery, dispensation, or distribution of a controlled substance. . . ." The Texas Controlled Substances Act, V.A.C.S. Art. 4476-15, also provides numerous opportunities for possible charges. The only advantage of *Texas Penal Code*, Art. 7102 is that certain forms of probation are restricted, Texas Code of Criminal Procedure, Art. 42.14 § 3e(a)(3).

So we have an accused who apparently committed a crime and is now convicted, but the rub is that he did not commit the crime of which he is convicted. In our headlong rush to strengthen the forces of law and order, the labor of matching criminals with the crimes they actually committed could perhaps be considered an unnecessary burden on law enforcement. For if the individual is truly guilty how can he justly complain or society justly complain about his conviction of a crime even if it were not committed by him? The problem with this approach is that it *totally* replaces a respect for

law with merely a respect for conviction and punishment. This moves our criminal jurisprudence in a retrograde direction back to some period antedating written law. After all, there was always conviction and punishment even without the benefit of the clarity and definition provided by the law. And that is all we have here, mere conviction and punishment instead of conviction and punishment under law.

If this Court has rejected the concept that criminals should be convicted of crimes they did commit as against crimes they did not commit as an outmoded, self-indulgent example of liberal jurisprudence (which it is not), then certiorari should properly be denied. If this Court feels that this case sets a dangerous precedent in seriously tampering with statutory language which is common to the entire nation as well as evidencing a lack of interest in matching crimes to the accused, then certiorari should be granted.

D. Summary.

In summary, the statutory language found in V.T.C.A. Penal Code, Section 71.02(a)(5) "possession . . . through . . . fraud, misrepresentation, or deception" and its companion statute in the Controlled Substances Act, V.A.C.S. Art. 4476-15 § 4.09(5) has been applied for a reasonable length of time and in many diverse jurisdictions. This language has never been applied in any reported case in Texas, nor in any other State, nor in the Federal Courts to a factual situation even remotely similar to that we have here. Such conduct of an alleged co-conspirator using an alias during an alleged illicit marijuana smuggling venture simply does not fall under the scope of the language above. Additionally, even if this statutory language were applied to such conduct in

a radical and novel redefinition of the statutory language, it still would not apply to the facts in this case because the deceptions listed in the opinion of the Court of Appeals were not means by which or through which marijuana was possessed. For this reason, the evidence introduced against the Petitioner was insufficient to prove he conspired to possess marijuana "by fraud, misrepresentation and deception," and thus he must be accorded a belated judgment of acquittal. Failure to do so would surely tend to undermine public respect for the written Criminal Law which governs so much of our lives.

II.

THE INTERPRETATION GIVEN TO WHETHER *TEXAS PENAL CODE*, ART. 71.02(a)(5) BY THE TEXAS COURT OF APPEALS SO AS TO PERMIT CONVICTION OF THE OFFENSE OF POSSESSION OF A CONTROLLED SUBSTANCE BY FRAUD, MISREPRESENTATION, OR DECEPTION ON EVIDENCE SHOWING ONLY THAT THE ACCUSED "[FLEW] IN AN UNCERTIFIED PLANE, [USED] AN ALIAS TO RENT AN APARTMENT WHERE THE CONSPIRATORS MET, [LIED] ABOUT HIS ASSOCIATION WITH [A CO-CONSPIRATOR], AND [LIED] ABOUT HIS PASSPORT," IS SO VAGUE AND INDEFINITE AS TO FALL AFOUL OF THE UNITED STATES CONSTITUTION.

A. Indefinite and vague language in general.

If the interpretation of the statutory language by the Texas Court of Appeals is correct and proper, if the acts of using an alias, flying in an uncertified plane, etc., constitute possession of a controlled substance through or by fraud, misrepresentation, etc., then the statutory language falls afoul of the due process guarantees of the Fifth and Fourteenth Amendments to the United

States Constitution. Such constitutional provisions prohibit both the Federal and State Legislative bodies from passing penal laws which are so vague and indefinite as to fail to give proper notice of what conduct is prohibited.

> A State may not issue commands to its citizens, under criminal sanctions, in language so vague and undefined as to afford no fair warning of what conduct might transgress them.

Raley v. Ohio, 360 U.S.C. 423, 438, 79 S. Ct. 1257, 3 L. Ed. 2d 1344 (1959).

As Chief Justice Burger recently pointed out:

> As a matter of due process, "[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids." *Lanzetta v. New Jersey*, 306 U.S. 451, 453, 59 S. Ct. 618, 83 L. Ed. 888 (1939).

Hynes v. Mayor of Oradell, 425 U.S. 610, 620, 96 S. Ct. 1755, 48 L. Ed. 2d 243 (1976).

This prohibition against vague and indefinite criminal statutes includes a policy in favor of lenity especially in legislation creating new crimes:

> [T]his Court's long-established practice of resolving questions concerning the ambit of a criminal statute in favor of lenity . . . reflects not merely a convenient maxim of statutory construction. Rather, it is rooted in fundamental principles of due process, which mandate that no individual be forced to speculate, at peril of indictment, whether his conduct is prohibited.

Dunn v. United States, 442 U.S. 100, 112, 99 S. Ct. 2190, 60 L. Ed. 2d 743 (1979).

B. The indefiniteness of the specific statute as interpreted by the Texas Court of Appeals.

When the Texas Court of Appeals expanded the meaning of the possession of a controlled substance through fraud, forgery, misrepresentation, deception provision to include any covert act related to a controlled substance conspiracy and gave examples of such covert activities which would violate the statutory language: flying in an uncertified plane, using an alias to rent the apartment where the conspirators met, lying about his association with Baldi and lying about his passport, *Erwin v. State*, No. 10-81-001-CR, Slip Opinion June 3, 1982, at 8, it opened the door to a myriad of possible applications of the statutory language, including:

> 1. *Any controlled substance transaction in which the participant or participants are less than open about their status as controlled substance possessors or distributors.*

Since controlled substances are generally illegal to possess or distribute, most violators of the law tend to travel and act covertly. Utilizing the interpretation given the language by the Court below, the State could add another count or counts to every controlled substances indictment alleging with some justification that misrepresentation or deception was involved. For instance, the state could add at least one count (two in a conspiracy situation), in any case involving:

(a) Placing or intending to place a controlled substance in an "innocent" container like luggage;

(b) Placing a controlled substance in a container marked as a container of other substances;

(c) Secreting a controlled substance in one's clothing;

(d) Using an assumed name or an alias while possessing a controlled substance;

(e) Using an assumed name or refusing to give one's proper name in a controlled substance transaction;

(f) Using an assumed name to rent an apartment or hotel room where controlled substances are possessed or even discussed;

(g) During a controlled substance conspiracy, claiming to law enforcement officers or anyone that one did not know another conspirator;

(h) After the failure of a controlled substance conspiracy, claiming to law enforcement officers or anyone that one did not know another conspirator;

(i) Claiming that one had lost his visa or passport after returning from a successful attempt to possess a controlled substance;

(j) Claiming that one had lost his visa or passport after returning from an unsuccessful attempt to possess a controlled substance;

(k) Driving a vehicle with an expired driver's license or no license, expired safety inspection sticker or no sticker, expired registration or no registration while carrying a controlled substance, discussing the possession of a controlled substance, or returning from a successful or an unsuccessful attempt to possess a controlled substance;

(*l*) Wearing attire or otherwise concealing one's appearance or identity while possessing, attempting to possess, or discussing the possession of controlled substances;

(m) Using a business as a cover for controlled substance discussions or transactions; and

(n) Et cetera.[1]

2. *Since the possession of a controlled substance accomplished through obtaining such substance from a lawful supplier has already been interpreted as being part of the "possession . . . through . . . misrepresentation" phraseology, the dropping of the requirement that the possession be accomplished strictly through or by the misrepresentation opens the statutory door even further.*

This interpretation has already been utilized by the Texas Courts which have applied this identical language to cases where the Defendant uses "misrepresentation," etc., to obtain a controlled substance from an otherwise legitimate source, such as a pharmacy, etc., *Posey, supra*; *Rejcek, supra*; *Ex Parte Russell, supra*; *Clark, supra*; *Ex Parte Holbrook, supra.* For example:

(a) Driving to pick up an otherwise legitimate prescription with an expired driver's license, a fraudulent driver's license, a driver's license issued to another;

(b) Possessing a legitimately prescribed controlled substance in a hotel room or apartment rented under an alias;

(c) Discussing the legitimate possession of a controlled substance by prescription in a hotel room or apartment rented under an alias;

(d) Et cetera.

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[1] As this Court will note, the actual acts upon which the Court of Appeals relied are included above and actually appear even less justifiable than some other examples.

Again it is the elimination of the strict connection of the "fraud, misrepresentation, etc." with the obtaining of possession of the controlled substance that pushes the statute into the void of ambiguity, vagueness, and indefiniteness.

C. Summary.

In summary, the interpretation of the Texas Court of Appeals which allows mere covert acts unrelated to the actual obtaining of possession of a controlled substance to suffice for obtaining a controlled substance by misrepresentation, deception, etc., that make these examples and the examples that this Court might imagine possible. There is no reason for this interpretation save allowing the State the convenience of convicting this Defendant of the crime of which he is indicted regardless of the bizarre effect on the original statute. The Texas Court of Appeals probably never saw what would happen to the statute generally if this conviction was held. Should this Court find that this novel and radical interpretation is valid, then the Petitioner contends that the statutory language violates the due process clause because it is vague and indefinite to an extreme.

CONCLUSION AND PRAYER

The Petitioner asks this Court to find that this statutory language which is common to controlled substance law nationwide was erroneously construed by the Texas Court of Appeals or else that this Court find that the tortured interpretation of this cause renders this statute in violation of the due process clauses of the Fifth and Fourteenth Amendments because it becomes incurably vague, ambiguous, and indefinite. Nothing was gained by the State of Texas in this case that would justify

convicting a Defendant of a crime he did not commit or that would justify convicting a Defendant through misconstruing a statute so radically that it loses its claim to validity under the United States Constitution's due process clauses. The only morsel gained by the State for prosecuting under Art. 71.02 as against prosecuting this Petitioner under the Texas Controlled Substances Act, V.A.C.S. 4476-15 was the elimination of the possibility of probation or "shock probation," *Texas Code of Criminal Procedure*, Art. 42.14 § 3e(a)(3). Such a boon to the State does not justify this case.

WHEREFORE, the Petitioner prays that this Court grant a writ of certiorari to the Court of Appeals for the Tenth Supreme Judicial District, Waco, Texas, and thereafter reverse his conviction and enter a judgment of acquittal, or, in the alternative, thereafter dismiss his indictment as being based on a statutory provizion which is unconstitutionally vague and indefinite.

Respectfully submitted,

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